jar/jms

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 02-40050-01-JAR**
	)	
Bryan Keith Carter,	)	
	)	
Defendant.	)	
	)	

SUPPLEMENTAL MEMORANDUM OPINION

This comes before the Court by an Order (Doc. 49) of the Tenth Circuit Court of Appeals. After this Court issued its Memorandum Order and Opinion Denying Defendant's Motion to Suppress (Doc. 21),[1] the Tenth Circuit Court of Appeals remanded the matter to this Court, ruling that:

> The officers' initial entry onto the premises and their seizure of Defendant did not violate the Fourth Amendment. Their subsequent entry into the backyard and sweep of the garage, however, were unreasonable under the Fourth Amendment, necessitating a consideration of whether the consents were fruit of the violation. Because the district court did not evaluate whether the consents were tainted by the preceding illegality, we REMAND this matter to the district court to make that determination. We retain jurisdiction over this appeal pending supplementation of the record by the district court.[2]

This Court thereafter invited the parties to supplement the record with memoranda and evidence, and set the matter for hearing. Although the parties filed supplemental briefs, neither took the opportunity to present additional evidence. Thus, the evidentiary record has not been supplemented,

[1] *United States v. Carter*, No. 02-40050-01, 2002 WL 31385813 (D. Kan. Oct 17, 2002).

[2] *United States v. Carter*, 360 F.3d 1235, 1243 (10th Cir. 2004).

and this Court's determination of the defined issue is based on the same evidentiary record, the memoranda of law, arguments of counsel, and the analysis and guidance in the Tenth Circuit's decision. Having duly considered these matters, this Court is prepared to rule. For the following reasons, this Court determines that the consents to search were tainted by the Fourth Amendment violation.

Facts

Based on the evidence at the suppression hearing, the court finds as follows. During the protective sweep conducted by Officers Souma and Garman, in the front of the garage, Officer Souma saw in plain view: a lot of electronics equipment, cameras, "palm hand helds" and video recorders, as well as a lot of "junk" stacked high to the ceiling. The back area of the garage was furnished like an apartment. There, in plain view, Officer Souma saw the barrel of a shotgun next to a couch, and a small bag of white powder the officers believed to be methamphetamine, sitting next to the television and video recorder.

Immediately upon returning from the protective sweep, Officer Souma approached the handcuffed defendant, *Mirandized*[3] him, advised him what the officers had seen in the garage and began to question him. Although neither party presented any evidence about the length of this questioning, the Court finds that it took more than a few minutes, but less than a half hour. This finding is based on the evidence that Officer Souma's questions were focused on who lived in, occupied or controlled the garage. The defendant's responses to these questions were apparently not straightforward. In fact, the defendant gave several, inconsistent responses: that he lived in the garage;

[3] *Miranda v. Arizona,* 384 U.S. 436 (1966).

that he lived in the garage sometimes but had no control of it because it was his mother's house; and that the garage belonged solely to him and that his mother had no control or access to the garage. This suggests that Officer Souma and the defendant engaged in more than a brief, cursory colloquy. It had to take at least several minutes of repeated or restated questions, and likely some narrative responses, for the defendant to express these inconsistencies. Nevertheless, it certainly did not take as long as thirty minutes, to discuss the occupancy and control of the garage, and to inform the defendant of what the officers had observed in the garage.

Meanwhile, Officer Garman separately questioned the defendant's mother, who advised that the defendant sometimes lived in the garage and sometimes lived elsewhere with his girlfriend. Officer Garman's questioning may have taken longer than Officer Souma's. Officer Garman spent some time explaining to the defendant's mother in "great detail" that information was obtained through an intelligence report about the possibility of illegal activity at the residence. Officer Garman also explained to the defendant's mother and boyfriend why the police were there and what they wanted to do. In addition, Officer Garman explained to the defendant's mother what her rights were. Officer Garman spent so much time explaining her right to deny them consent, that the defendant's mother asked him if he was trying to talk her out of giving consent.

Discussion

As the Tenth Circuit stated in its decision, the defendant does not challenge this Court's determination that the consents by him, his mother and his mother's boyfriend were voluntary.[4] But

[4]*Carter*, 360 F.3d at 1243 ("Defendant apparently does not challenge the district court's determination that the consents were voluntary under the general totality-of-the-circumstances standard set forth in *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).")

when consent is obtained after a Fourth Amendment violation, it is not enough to show that the consent was voluntary. The government must also demonstrate a break in the causal connection between the illegality and the consent, such that the consent was "sufficiently an act of free will to purge the primary taint."[5] "Although the two requirements will often overlap to a considerable degree, they address separate constitutional values and they are not always coterminous."[6] The government must prove that the consent was such an act of free will, by showing, "from the totality of the circumstances, a sufficient attenuation or 'break in the causal connection between the illegal detention and the consent.'"[7] No single fact is dispositive, but the factors set forth in *Brown v. Illinois,*[8] though not exclusive, are especially important: (1) the temporal proximity of the illegal detention and consent, (2) any intervening circumstances, and (3) the purpose and flagrancy of any official misconduct.[9] Applying these factors, this Court concludes that the consents were not acts of free will sufficient to purge the taint of the illegal search.

Temporal Proximity

At most, the officers had obtained consents from the defendant and his mother within thirty

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[5]*United States v. Melendez-Garcia*, 28 F.3d 1046, 1054 (10th Cir. 1994) (citing *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

[6]*Id.*

[7]*United States v. Caro*, 248 F.3d 1240, 1247 (10th Cir. 2001) (citing *United States v. Gregory,* 79 F.3d 973, 979 (10th Cir. 1996) and *United States v. McSwain*, 29 F.3d 558, 562 n.2 (10th Cir. 1994)).

[8]422 U.S. 590, 603-04 (1975).

[9]*Caro*, 248 F.3d at 1247; *Gregory,* 79 F.3d at 979.

minutes after they finished the protective sweep. In *Brown v. Illinois*,[10] a confession given less than two hours after an illegal arrest, without any intervening circumstances, was tainted. In *Taylor v. Alabama*,[11] a six-hour period between illegal arrest and interrogation did not dissipate the taint. And, in *United States v. Melendez-Garcia*,[12] a lapse of seconds or minutes rendered the consent tainted. Here, immediately after the illegal search, officers began their dialogue with the defendant and his mother, which soon resulted in their written consents. Although the officers' explanations to the defendant and his mother might have given them information allowing them to contemplate their options and reach a considered decision, because their decisions to consent were made so soon after the illegal search, it is doubtful that the defendant and his mother had time to independently consider, weigh, and reflect on their options. They reached their decisions to consent very quickly, while engaged in dialogue with the officers.

Intervening Circumstances

Intervening circumstances may be sufficient to break the causal connection between illegal search and consent, purging the consent of the taint. For example, if officers developed independent evidence that justified their seeking consent to search, that might be an intervening circumstance sufficient to purge the taint of any consent.[13] Here, with respect to the defendant's consent, the only

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[10] 422 U.S. at 604.

[11] 457 U.S. 687, 691 (1982).

[12] 28 F.3d at 1055.

[13] *See United States v. Nooks*, 446 F.2d 1283, 1287 (5th Cir. 1971) (The nexus between the Fourth Amendment violation and consents was sufficiently attenuated when defendant committed an additional crime by shooting at an officer). Other examples of intervening circumstances sufficient to break that chain include a hearing before a magistrate judge at which the defendant was advised of his rights, *Gregory*, 79 F.3d at 790 (citing *Johnson v.*

attenuating event was that Officer Souma *Mirandized* the defendant. And, with respect to his mother's consent, there were no attenuating events, other than Officer Garman's explanation of her right to not consent. But *Miranda* warnings alone are insufficient to attenuate the taint of a Fourth Amendment violation.[14] For if Miranda warnings alone were sufficient attenuation of the taint, then "[a]ny incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'"[15] And, the fact that the defendant and his mother (as well as her boyfriend) signed written consents so shortly after the illegal search, does not constitute sufficient attenuation either.[16] Particularly because the defendant and his mother already knew that police had seen incriminatory evidence during the protective sweep, their giving written consents is not demonstrative of an act of free will, and could be viewed as yielding to the inevitable.

Purpose and Flagrancy of Official Misconduct

Although the officers obtained the consents after informing the defendant and his mother of what was observed in the sweep, nothing suggests that the officers intentionally exploited the illegal search to

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Louisiana, 406 U.S. 356, 365, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)), and the issuance of a search warrant that resulted in the independent discovery of drugs and a spontaneous admission, *see Rawlings v. Kentucky*, 448 U.S. 98, 108-09, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980).

[14]*Kaupp v. Texas*, 538 U.S. 626, 633 (2003).

[15]*Brown v. Illinois*, 422 U.S. at 602-03.

[16]*United States v. Maez*, 872 F.2d 1444, 1456 (10th Cir. 1989) (witness signed two written consent forms); *United States v. McSwain*, 29 F.3d 558, 563 n.4 (10th Cir. 1994) ("We point out that just because an officer informs an individual of the right to refuse consent does not necessarily mean the individual's consent will be voluntary in fact. *See Fernandez*, 18 F.3d at 882 n.8 (citing cases in which consent did not purge taint of illegal police actions even though individuals signed consent to search form or were informed of right to refuse consent).")

obtain consents. Rather, the evidence is that the officers were, in their view, being cautious and conscientious in explaining to the defendant, and particularly in explaining to his mother, why they wanted to search. And, the evidence is that during the protective sweep, officers only observed what was in plain view; they did not begin searching at that point.

Although there is no evidence that officers acted in bad faith, or with the intent to exploit the illegal search to obtain consents, on balance the other pertinent factors weigh in favor of finding that the illegal search tainted the consents. There was no attenuation, intervening circumstances or significant period of time between the illegal search and obtaining the consents. The consents were given in the same location as the protective sweep. And the consents were given after officers advised both the defendant and his mother of what was seen during the illegal search. This Court concludes that the government has not demonstrated that the consents were the product of independent acts of free will, purged of the taint of the illegal search.

Conclusion

For the reasons and authorities set out above, this Court concludes that defendant's motion to suppress the evidence seized in the search should be granted, for although the consents were voluntarily given, there is insufficient evidence that the consents were the product of an exercise of free will.

Dated this 12th day of May, 2004 at Topeka, Kansas.

S/ Julie A. Robinson
JULIE A. ROBINSON
United States District Judge